New Relationship of the Antarctic Treaty System and the UNCLOS System: Coordination and Cooperation

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Abstract— United Nations Convention on the Law of the Sea (UNCLOS) system applies to all the ocean of the world, while Antarctic Treaty System (ATS) applies to the land and ocean of south of 60° S. Therefore, the ocean of south of 60°S will be regulated by the UNCLOS system and ATS simultaneously. Conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) agreement is in accordance with UNCLOS, so it will also apply to the ocean of south of 60°S. But within the framework of ATS, the BBNJ issues were already regulated or noted, such as: MPAs, Utilization of Genetic Resources and IUU Fishing. Coordination and cooperation are urgently needed. Through the review of legislation history of Convention on the Regulation of Antarctic Mineral Resources (CRAMRA), we could get some experience of this coordination and cooperation. And through theory and practice analysis, we could conclude that the coordination and cooperation is feasible. Hence, the delegates who participated legislation work of BBNJ agreement should pay attention to this phenomenon and discuss the coordination and cooperation with ATS to lay foundation for the application in the ocean of south of 60°S.

Keywords—UNCLOS System; Antarctic Treaty System; coordination and cooperation

I. INTRODUCTION

UNCLOS is “a global convention applicable to all ocean space. No area of ocean is excluded. It follows that the convention must be of significance to the Southern Ocean in the sense that its provisions also apply to that ocean”. According to Art.6 of Antarctic Treaty, the Antarctic Treaty precludes its influence on the international status of the high seas in its application scope. Therefore, all seems harmony, the UNCLOS applies to the Southern Ocean and the Antarctic Treaty doesn’t affect the application of the provisions of high seas in UNCLOS, provided that there are no claims of land sovereignty in Antarctica. The existence of the “agree to disagree” approach concerning the sovereignty claim, which is the foundation of Antarctic Treaty, makes the boundary of the high seas in the Antarctica ambiguous, thus, a latent conflict between the UNCLOS System and the ATS and all agreements based on the two treaties comes out.

II. THE RISE OF THE QUESTION

On 30 June 2011, the 66th United Nations General Assembly (UNGA) adopted a resolution concerning the establishment and the recommendation of the Ad Hoc Open-ended Informal Working Group (Ad Hoc Working Group) on conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction by consensus. The recommendation says that, “A process be initiated, by the General Assembly, with a view to ensure that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively address those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the UNCLOS”, [1] and the process should take account of “marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including protected areas and environmental impact assessments; capacity-building and the transfer of marine technology”.

But when BBNJ issues said above comes to the marine area in Antarctica, there will be an overlap or a conflict with the ATS. According to Art. 6 of the Antarctic Treaty, the provisions of the treaty shall not “prejudice or in any way affect the rights or the exercise of the rights, of any State under international law with regard to the high seas within that sea”. According to Art. 4 of the Antarctic Treaty, there is an agreement to disagree concerning the sovereignty claim in Antarctic continent which is called the “bi-focal approach”. And on the basis of which, the claimants support that the Antarctic Treaty is in favor of their sovereignty claims while the non-claimants argue that the Antarctica Treaty does not recognize any sovereignty claim. This situation will be more complex in the context of the UNCLOS. In accordance with provisions of the UNCLOS, all the marine area regulated in the convention are on the basis of the baseline whose prerequisite is territory sovereignty. Therefore, in the view of the non-claimants, all the marine area in south of 60° S is high seas, but in the view of the claimants, in light of that the Antarctic Treaty “does not affect preexisting territory claims nor the consequences of the preexisting sovereignty including the

territorial sea, the contiguous zone, the continental shelf and the EEZ".[2] Though such an approach settles the dispute of sovereignty claims temporarily to reach an agreement on the conduction of scientific research, but it leaves a difficulty when questions based on this approach arise, such as: the fixing on of the boundary of the high seas. And also it makes the scope of BBNJ vague.

The adoption of CCAMLR makes the problem more complicated. According to the preamble and Art. 1 of CCAMLR, in order to "safeguard the environment and protect the integrity of the ecosystem of the seas surrounding Antarctica", the CCAMLR extends itself to the Antarctic Convergence whose north boundary is about 45° S to 50° S. The object of the CCAMLR is to protect the marine living resource in Antarctica, and its main theme now is the regulation of the marine living resource, such as the hot topic "illegal, unreported, unregulated fishing" (IUU Fishing). CCAMLR devotes itself to protect marine living resources, so it is quietly difficult to judge that there is no connection between what CCAMLR does and what BBNJ does.

What needs more attention is that, as an authority, the Antarctic Treaty Consultative Meeting (ATCM) has already taken some measures about the conservation of the marine biodiversity, such as: in the application area of CCAMLR, it has already taken measures to conserve marine biodiversity in Antarctica; in the paper submitted by the UK to the ATCM, there is a concerning about bio-prospecting in the Antarctic, and the France and the Netherland express the same concerning ...This indicates that the ATCM tends to regulate the marine biodiversity itself as an authority of the Antarctica in the Antarctic area. The conflict is enlarging and becoming more complicated.

III. THE EXPERIENCE OF THE CONVENTION ON THE REGULATION OF ANTARCTIC MINERAL RESOURCES ACTIVITIES

As mentioned above, the continuance of the conflict between the UNCLOS System and ATS exists in many areas that based on the two respectively, such as: the regulation of mineral activities, and from which, we could learn some lessons.

In 1981, the ATCM adopted Recommendation XI-1 at Buenos, according to which, the fourth ATCM on Antarctic Mineral Resources was convened at Wellington from 14-25 June 1982, and eventually the final act of CRAMRA was adopted. But years later it was replaced by the Protocol on Environmental Protection to the Antarctic Treaty (The Protocol). During the negotiation of CRAMRA, there was a challenge from the UN to contest the ATCM as an authority to regulate mineral activities in Antarctica. "In the early 1980s Malaysia leads a challenge to the ATS in the UNGA, arguing that the ATS privileged certain states and that the Antarctic continent should be declared as the common heritage of the mankind". At that time, the ATS was dedicated to establish its own mineral activities regulation regime in Antarctica before the establishment of the International Seabed Authority (ISA). To respond to this contest, it uses the rhetorical position that the dedication of its activities on the Antarctic continent is struggle to protect the peace and scientific research, thus it's

"already functioning on the basis of the interests of all the mankind as a whole" and "in defending the ATS against the Third World challenge, it was agreed in 1984 that all contracting parties could attend the negotiation on the minerals convention and several Third World states, including India and China, were granted Consultative Party status".

In addition, things are different when benefits distribution happens in a place which is permitted for scientific research and peaceful purpose activities only, especially under the condition that sovereignty disputes still exist in Antarctica. Dispute will always exist no matter granting the claimants benefits or granting all states who are parties to the Antarctic Treaty benefits, especially when the Common Heritage of Humankind principle which has already become a customary international law applies. Everyone desires to share the benefits derived from the Antarctica which is, to some extent, in the same status of the Area. What's more, even though the CRAMRA sets a lot of prerequisites for mining activities and provides a series of obligations and responsibilities for Antarctic mineral resources exploiters to protect the environment, it still permits the conduction of mineral activities in Antarctica. The extreme fragility of the Antarctic environment makes any mineral exploitation activities harmful to the ecological environment in the Antarctica; hence, the abundant articles regulated in CRAMRA to safeguard the ecological environment in Antarctica are useless from the very beginning of the establishment of the convention. Then on May 1988, the Prime Minister of Australia announced that Australia would not sign the CRAMRA and then France did the same thing later.

What needs more attention is that there is another reason that makes the Australia to refuse the CRAMRA that is the so-called economic reason. "Australia is a leading producer of some of the minerals that may be mined in Antarctica. There is a concern within the Australian Treasury that CRAMRA does not provide sufficient safeguards to protect the Australian mining industry against competition from Antarctic mineral resource activities". "Another economic reason which influenced Australia's position on CRAMRA is the absence of royalty provisions in the Convention for claimants such as Australia".

There is one article in CRAMRA dealing the cooperation with the United Nations. Art. 34, paragraph 2 of CRAMRA says that "The Commission shall also, as appropriate, cooperate with the United Nations, its relevant Specialized Agencies, and, as appropriate, any international organization which may have competence in respect of mineral resources in areas adjacent to those covered by this Convention". UNCLOS is adopted by the UNGA, Part XI of it is devoted to establish a regime to regulate the mineral exploitation activities in the Area (that is the ISA nowadays, at that time it was called ISBA). Thus if the CRAMRA came into force, the international cooperation regulated in it will be the cooperation between the ISA and the Commission established in accordance with the CRAMRA. Therefore, we could conclude that the CRAMRA is independent and it regulated the mineral activities itself within the south of 60° S, in another word, it refuses to yield to the UNCLOS concerning the jurisdiction of mineral activities within the south of 60° S.

In a summary, the ATCM established its own regime to regulate the mineral activities in Antarctica withstand the challenge of the principle of the Common Heritage of Humankind. And it ever dealt with the relationship between UNCLOS and ATS. Unfortunately, it was replaced by the Protocol, according to which any activities relating to the mineral resources other than the scientific research are prohibited comprehensively in Antarctica. The reasons of failure of the CRAMRA are the protection of the fragile ecological environment in Antarctica and the collapsing of the balance of benefits distribution between the claimants and the non-claimants. What needs more attention is that the appearance of the Protocol strengthens the nature of the activities in Antarctic that is peaceful purpose and scientific research. And this increases the difficulties of the exploration and exploitation of any resources in Antarctica.

IV. THE FEASIBILITY OF COOPERATION AND COORDINATION

The first emergence of the concern of marine biodiversity beyond national jurisdiction within the United Nations is in the paper submitted by the delegations of the Netherland to the UNGA on 22 May 2003, *The need to protect and conserve the vulnerable marine ecosystem in areas beyond national jurisdiction*, [3] in which it focuses on the marine genetic resources in the deep seabed areas beyond national jurisdiction. Then on 16 May 2008, the Ad Hoc Working Group was officially established within the UNGA on 16 May 2008, afterward there happens a lot of establishments of the Ad Hoc Working Group and issues of discussion summaries, recommendations and reports of the Secretary-General on the Oceans and the Law of the Sea. Even though the Ad Hoc Working Group didn't finish, from the previous establishments and the summaries and recommendations of the Ad Hoc Working Group, we still could conclude that the main aspects of BBNJ are "genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected area; environmental impact assessments; capacity building and the transfer of marine technology". And "it was noted that increasing scientific knowledge of the oceans was a major challenge". In addition, the question of whether new international instruments are needed is also on a hot debate. "Many delegations while noting the existing efforts, identified legal or regulatory and implement gaps in relation to marine biodiversity beyond national jurisdiction, which, they noted, evidenced the need for an international instrument that would focus on addressing those gaps activities in the oceans and seas and included all the relevant principles". What needs special attention is that the delegations who attended the Ad Hoc Working Group meetings also emphasize that "the international cooperation and coordination among and between states and competent sectoral organizations should be strengthened". But throughout all the documents produced during the discussion of all the Ad Hoc Working Group meetings, there is no any reference to Polar Areas, notwithstanding the resolution of potential conflict between the UNCLOS System and the ATS on BBNJ. But if we have to say discussions of Ad Hoc Working Group meeting have already mentioned about the resolution of the potential conflict, we could only find some reference in the words "international cooperation and coordination between the

sectoral organizations". And in my opinion, the cooperation and coordination between the UNCLOS System and the ATS lies in the following aspects: scientific research, bioprospecting and the IUU Fishing.

Antarctic Treaty is the foundation of ATS. In Antarctic Treaty, there are two key words throughout the provisions, hence they are also the foundation of ATS that are: scientific research and sovereignty. "Scientific developments during the second World War (particularly in the areas of rocketry, radar and radio) together with the awareness of the importance of the Polar areas for understanding the earth's magnetic field drove interest in large-scale scientific experiments". [4] Then from 1 June 1957- 31 December 1958, "12,000 scientists from 67 nations generated a total of 48 volumes and an unprecedented number of Antarctic scientific papers". After the study of the Antarctic in peace, "many nations benefited from the international cooperation engendered by the International Geophysical Years (IGY), and were keen to see the cooperation to continue". Then after 18 months' negotiation from June 1958 to December 1959 in Washington, the Antarctic Treaty was adopted through the method of "agree to disagree" of the sovereignty claim.

According to Art. 1.7of CRAMRA, the provisions of the definition of the mineral resources activities exclude mineral resources activities conducted by scientific research to avoid affecting the development of the scientific research in Antarctic while impose rigid standards on the mineral resources activities. The Protocol which replaced the CRAMRA also excludes the mineral resources activities conducted by scientific research while prohibit mineral resource activities in Antarctic comprehensively. All of these could be of enough evidence of that the scientific research is the foundation of the Antarctic Treaty, and is always in the first place while discussing Antarctic affairs. The discussion of the scientific research in BBNJ within the Ad Hoc Working Group shows that there are different views on regulation of the scientific research. Some delegations tend to put this issue under part 7 of the UNCLOS which is about the freedoms in the high seas, in which the freedom of scientific is contained. If so, there will be no conflict on the freedom of the scientific research. However when it comes to the jurisdiction of the regulation of scientific research, there must be a conflict, inter alia, in the Antarctic high seas, but this conflict will be of the possibility to cooperate and coordinate.

The issue of bioprospecting was already noted and was firstly discussed within the ATCM in 2002 formally in Working Paper submitted by the UK. [5] And also, in this paper, the definition of bioprospecting was given. In 2006 and 2010, France and Netherland submitted their Working Paper concerning the bioprospecting respectively to the ATCM. The core question involved in bioprospecting is the intellectual property of genetic resource materials. Because some countries support that these genetic resource materials should be protected by intellectual property, such as the USA, while other countries tend to not protect these genetic resource materials, such as China. In the discussion of the Ad Hoc Working Group, some delegations also want to regard these genetic resource materials as Common Heritage of Humankind. And the "Working Paper submitted by the UK to the 2002 ATCM drew

attention to the potential for conflict between the secrecy involved with patenting biological and genetic materials and the principle of the freedom of access to scientific information ad embodied in article 3 of the Antarctic Treaty.” Therefore, the design of the benefits distribution of BBNJ and the ATS should be unanimous, or the conflict derived from will not be reconcilable.

IUU Fishing is firstly put forward within the framework of the CCAMLR to prevent the threats caused by the IUU Fishing to the marine living resource in Antarctica.[6] The CCAMLR has a long history in coping with the problem of IUU Fishing and achieves a lot in the process. Within the framework of CCAMLR, the main difficulty is the jurisdiction of the Commission for CCAMLR. When ships from the member states of the CCAMLR conduct IUU Fishing in sea area regulated in CCAMLR, the Commission of course has the jurisdiction to take measures to these ships to protect the marine living resource. But while the ships from non-member states of CCAMLR conduct IUU Fishing in sea area regulated in CCAMLR, there is no legal basis for the Commission to execute its jurisdiction, especially in the situation that the rules in the CCAMLR are not customary international law. Currently, most regulation resources of IUU Fishing conducted by the ships from non-member states of CCAMLR are the national law of non-member states. During the discussion of BBNJ, IUU Fishing was also involved, “A view was expressed that unsustainable fishing, in particular over fishing, illegal, unreported, and unregulated fishing and certain destructive fishing practices was the greatest threat to the conservation and sustainable use of the marine biodiversity beyond national jurisdiction”. And once the arrangement is achieved basing on the UNCLOS, we will find that it will alleviate the pressure of the Commission and also could help resolve the problem of IUU Fishing in Antarctica better. But the prerequisite should be considered, such as: the jurisdiction, the measures taken and the judging standards and all of them should be in consistency. Either the CCAMLR try to adjust itself to be in consistent with the BBNJ Agreement, or the ATCM as an observer attends the discussion of BBNJ while the Antarctic is involved. If not, the conflict will not only make the resolution of IUU Fishing difficult, but also make the issue more complicated.

In a summary, we could find that as an authority in Antarctica, the ATCM is increasingly tending to manage the Antarctic affairs itself. In ATS, it is embodied in the Antarctic Treaty, the CRAMRA, the CCAMLR and the Protocol. What’s more, even though the ATS only regulates the continent and marine affairs in Antarctica, its measures have a significant influence to the globe, especially the global climate. Its independence is becoming more and more obvious; it is now

pretending to act in the same legal status as the UNCLOS. Thus it deserves great notice while discussing the resolution of the conflict between the ATS and the UNCLOS System.

V. CONCLUSIONS

The conflict between ATS and UNCLOS System has already existed since the birth of the UNCLOS on the ground that there is no any mention in UNCLOS about Antarctica. The conflict continues to exist in all agreements which are based on the two treaties respectively, such as the BBNJ Agreement. Even though the conflict has not yet mentioned in the discussion of BBNJ, it should be noted that the resolution of the conflict will definitely promote the development of the conservation and sustainable use of the marine biodiversity beyond national jurisdiction. And in my opinion, there are four ways to deal with the conflict: first, continue not to mention about this conflict, which is not appropriate; second, delimit the respective scope of the jurisdiction within the marine area of south of 60° S on the ground that the two are in the equal legal status; third, as a special observer, the ATCM attends BBNJ legislation meetings and puts forward some advices about the resolution of the conflict; fourth, the ATS and the UNCLOS establish an joint regime in the overlap sea area. And the second one and fourth one is in my favor.

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